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"... remanded solely for a determination of the propriety of venue under the 1966 amendment"³⁰ he would not have dissented.

The lot of the unincorporated association, particularly the labor union, has for more than a century been the stepchild of federal court action. If in the instant case the Supreme Court had held as it did on the basis of practicality instead of attributing unspoken intentions to the 1948 Congress, and if the Court had faced the reality that a labor union of today is different from a corporation only by way of the fact that it lacks a "birth certificate" and had by virtue of this fact treated them alike, the Court would be applauded for its reasoning. Nevertheless, the Court is to be commended upon the results at which it arrived in spite of the tortured approach to its conclusion.

LINDA RIGOT

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT: EMPLOYER'S LIABILITY TO THIRD PARTIES

ODECO hired a contractor to repair an oil tank on a fixed oil drilling platform in the Gulf of Mexico. Two employees of the contractor were injured when the tank exploded. The employees received workmen's compensation from the contractor under the Longshoremen's and Harbor Workers' Compensation Act¹ and also brought suit for damages against ODECO. ODECO filed a third party complaint against the contractor which was dismissed by the trial court. On appeal to the Court of Appeals, Fifth Circuit, *held*, affirmed: A third party tortfeasor is barred from indemnity against an employer under the Act unless the employer breached a duty it owed to the third party which was also the cause of the injury to the plaintiff-employee. *Ocean Drilling & Exploration Company v. Berry Brothers Oilfield Service*, 377 F.2d 511 (5th Cir. 1967).

Section 905 of the Longshoremen's and Harbor Workers' Compensation Act provides:

The liability of an employer prescribed in section 904 [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employment at law or in admiralty on account of such injury or death²

30. 387 U.S. 570 (1967) n.10.

1. 44 Stat. 1424 (1927), as amended, 33 U.S.C., ch. 18 (1964).

2. Similar provisions are found in almost all workmen's compensation statutes. A. LARSON, 2 LARSON'S WORKMEN'S COMPENSATION LAW, § 76 (1965), [hereinafter cited as 2 Larson's], e.g., FLA. STAT. § 440.11 (1965).

The purpose of this "exclusive-remedy" provision

. . . is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability of *such employer to its employee, or to anyone claiming under or through such employee, on account of his injury or death arising out of that employment*. In return, the employee, and those claiming under or through him, are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims.³

Third party tortfeasors, facing the prospect of paying heavy tort damages to plaintiffs injured by both the third party's negligence and the plaintiff's employer's negligence, have attempted to gain reimbursement from such employers on two theories: contribution and indemnity.⁴

Third party recovery against an employer on the theory of contribution is denied by the federal courts and by the great majority of state jurisdictions.⁵ Contribution requires two tortfeasors who share a common liability to the injured party.⁶ Since the employer's liability is not dependent on fault he is not a tortfeasor and shares no common liability with a negligent third party to the injured plaintiff-employee.

The argument that even under the common law rule of no contribution among tortfeasors, a passively negligent tortfeasor could recover contribution against an actively negligent tortfeasor, has been rejected on the theory that the compensation acts abrogate common law tort rules.⁷

Although ODECO's third party complaint did not attempt to recover on a theory of contribution, the Court noted that even if it assumed that ODECO was passively negligent and that the employer was actively negligent no recovery would be allowed on a theory of contribution.⁸

3. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 129 (1956). What the employer and employee received and lost by enactment of the compensation statute may be seen by the estimate that at the common law eighty per cent of tort actions brought by employees against employers were unsuccessful, due in large part to the employer's powerful defenses of contributory negligence, assumption of the risk and the fellow servant rule. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 672 (1910) at 5.

4. Contribution lies in tort, indemnity in contract, and they should not be considered equivalent theories of action. 2 LARSON'S § 76.10 (1965).

5. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); For state jurisdictions of the majority see 2 LARSON'S § 76.21, at 230 (1965); Pennsylvania's statute contains no express exclusive-remedy provision but limits the contribution of the employer to a third party to the amount payable as workmen's compensation benefits, *Kim v. Michigan Ladder Co.*, 208 F. Supp. 298 (W.D. Pa. 1962), *Brown v. Dickey*, 397 Pa. 454, 155 A.2d 836 (1959); North Carolina bars contribution between the third party and the employer but does allow the third party a set-off from a judgment an amount equal to the amount of compensation paid by the actively negligent employer. *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E.2d 768 (1953).

6. 18 AM. JUR. 2d *Contribution* §§ 1, 47 (1965).

7. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

8. *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Serv.*, 377 F.2d 511 (5th Cir. 1967); see *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.* 342 U.S. 282 (1952).

Third party recovery has been allowed in some cases against an employer on a theory of indemnity.

Indemnity has been granted where there was an express written contract whereby the employer promised to indemnify the third party for damages resulting from liability incurred by the third party due in part to the employer's negligence.⁹

The courts are hesitant, in the light of the obvious legislative intent expressed in the exclusive-remedy provision, to imply a promise to indemnify on the part of an employer.¹⁰ In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,¹¹ the Supreme Court of the United States implied such a promise¹² by the employer based on the "special rules governing the obligations and liability of shipowners."¹³ Ryan had contracted to load and unload Pan-Atlantic's ship, and in the course of unloading, an employee of Ryan was injured due to Ryan's negligence. The employee recovered damages from Pan-Atlantic as well as compensation from Ryan under the Act. In allowing Pan-Atlantic's claim for indemnity from Ryan the Court held that Ryan had impliedly promised to perform the services in a safe and workmanlike manner and that there was also an implied promise by Ryan to indemnify Pan-Atlantic for any damages for which the shipowner would become liable as a result of a breach of Ryan's duty to perform his services in a safe and workmanlike manner. The Court reasoned that the exclusive-remedy provision limits an employer's liability which arises on account of injury to an employee. Since the cause of the injury to the employee was also a breach of an independent duty which the employer owed a third party, the third party's action was not

9. *Yearicks v. City of Wildwood*, 23 N.J. Super. 379, 92 A.2d 873 (Super. Ct. 1952).

10. 2 LARSON'S § 76.10 (1965).

11. 350 U.S. 124 (1956).

12. State courts are split in their reaction to the *Ryan* rationale. Those that have adopted the rule have required either a written contract of indemnity or a service contract between the employer and third party in the performance of which the injury occurred to the employee. See *San Francisco School Dist. v. California Bldg. Maint. Co.* 162 Cal. App. 2d 434, 328 P.2d 785 (1st Dist. Ct. App. 1958). Several states have rejected *Ryan* as being repugnant to the express intention of their legislatures in enacting the exclusive-remedy provision. See, e.g., *American Radiator & Standard Corp. v. Mark Eng'r Co.*, 230 Md. 584, 187 A.2d 864 (Ct. App. 1963); *Royal Indem. Co. v. Southern Cal. Petroleum Corp.*, 67 N.M. 137, 353 P.2d 358 (1960).

The Florida courts have not yet met the problem at issue here, but see *Smith v. Ryder Truck Rentals, Inc.*, 182 So.2d 421 (Fla. 1966) as some authority that they would reject *Ryan*. However, a federal district court sitting in Florida has considered the problem and follows the decision herein noted, *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Serv.*, 377 F.2d 511 (5th Cir. 1967), in concluding that the exclusive-remedy provision of the Florida Compensation Law bars a third party tortfeasor from indemnity from an employer. *Florida Power & Light Co. v. Hercules Concrete Pile Co.*, 275 F. Supp. 427 (S.D. Fla. 1967).

13. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 130 (1956). A stevedore's servant, while working on a ship, is in the position of an invitee as to those parts of the ship in which he is required to be for the purpose of performing his duties. The shipowner has the duty to provide a safe place for him to work and to warn of any latent defects in the ship or its appliances. See Annot., 44 A.L.R. 932, at 1025, 1041, 1116 (1926).

on account of the injury to the employee and therefore was not barred by the exclusive-remedy provision.¹⁴

The Supreme Court has applied the *Ryan* rule only in maritime cases,¹⁵ although some federal circuits have extended the rule to non-maritime service contracts.¹⁶ No circuit has extended the rule to a case where a service contract was not involved.¹⁷

In the instant case the court pointed out that ODECO had no special liability comparable to that of the shipowner in *Ryan*:

The injured employees are thus not entitled to the warranty of seaworthiness and must rely solely upon the establishment of some independent act of negligence on the part of ODECO as a basis for recovery.¹⁸

Finding no special circumstances to justify implying a promise by the employer to indemnify the third party, the court held that there was no breach by the employer of an implied promise of workmanlike service.¹⁹ In short, the Fifth Circuit would not extend the *Ryan* rule to include a non-maritime service contract.

This refusal to extend *Ryan* beyond maritime cases seems to be a wise decision. To allow the employee to recover compensation from his employer as well as large tort judgments from his employer by the indirect route of a third party action for indemnity flies in the face of the obvious intent of Congress in enacting the compensation law and the exclusive-remedy provision of that law and threatens to disrupt the balance of interests which Congress sought to achieve by the law: insured compensation for the employee regardless of the employer's fault in return for definite limits to that absolute liability.

While the special liability of a shipowner perhaps justified the approval of the circumvention of the exclusive-remedy provision in *Ryan*, to extend this rule to non-maritime service contracts "breaks promises the Act made both to employers and employees."²⁰

JEFFREY TEW

14. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 129 (1956).

15. *E.g.*, *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Weyerhaeuser S.S. Corp. v. Nacirima Co.*, 355 U.S. 563 (1958).

16. *E.g.*, *General Elec. Co. v. Moretz*, 270 F.2d 780 (4th Cir. 1959); *American Dist. Tel. Co. v. Kittleson*, 179 F.2d 946 (8th Cir. 1950).

17. In *Svedlund v. Pepsi Cola Bottling Co.*, 172 F. Supp. 597 (D. Hawaii 1959), the federal district court dismissed a complaint for indemnity which alleged only the relationship of buyer and seller between the employer and third party as insufficient to base an implied promise of indemnity.

18. *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Serv.*, 377 F.2d 511, 513 (5th Cir. 1967).

19. *Id.*

20. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), *see* Justice Black's dissent.